Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SUNDSTRAND CORPORATION,

Petitioner,

v.

RONALD BLACKBURN and BARBARA BLACKBURN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

1. Whether the federal Employee Retirement Income Security Act ("ERISA") preempts a state common-fund doctrine when that doctrine would nullify the terms of a benefit plan created under ERISA?

2. Whether federal jurisdiction exists over an apportionment action where the apportionment action is independent of the underlying case, requests a declaration of a participant's rights under an ERISA plan and purports to invoke a state common-fund doctrine to nullify the terms of an ERISA benefit plan?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption, Sundstrand Corporation, Ronald Blackburn and Barbara Blackburn.

Pursuant to Rules 14.1(b) and 29.6 of this Court, Petitioner Sundstrand Corporation is a corporation. It does not have a parent corporation. Sundstrand Corporation has no subsidiaries that are not wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sundstrand Corporation ("Sundstrand") respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, entered in this case on June 3, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals of the Seventh Circuit (Judge Easterbrook) (App. A)[1] is reported at 115 F.3d 493 (7th Cir. 1997). The Memorandum Opinion and Order of the District Court for the Northern District of Illinois, Western Division (Judge Reinhard) (App. B) is reported at 933 F. Supp. 724 (N.D. Ill. 1996).

JURISDICTION

The decision of the Court of Appeals for the Seventh Circuit was issued June 3, 1997. Sundstrand filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on June 17, 1997. The Seventh Circuit denied the Petition for Rehearing on July 1, 1997 (App. C). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari is filed within 90 days of the Seventh Circuit's July 1, 1997 order denying the Petition for Rehearing.

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[1] References to the Appendix are cited as "App. ____".

STATUTES INVOLVED

28 U.S.C. § 1441 states in pertinent part as follows:

> Actions removable generally. (a) . . . (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.
>
> * * *

Section 502(a)(1) of the Employee Retirement Income Security Act (29 U.S.C. § 1132(a)(1)) provides in pertinent part as follows:

> (a) Persons empowered to bring a civil action.
>
> A civil action may be brought -
>
> (1) by a participant or beneficiary -
>
> (A) . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * *

Section 514(a) of the Employee Retirement Income Security Act (29 U.S.C. § 1144(a)) provides in pertinent part as follows:

> (a) Supersedure; effective date.
>
> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall super-

sede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

* * *

STATEMENT OF THE CASE

The first issue in this case is whether a state common law doctrine may nullify the terms of an employee benefit plan created under the federal Employee Retirement Income Security Act ("ERISA"). The second issue in this case is whether a federal court has jurisdiction in an apportionment action raising the first issue, which is filed in state court and timely removed to federal court.

A. The Facts

Ronald and Barbara Blackburn were injured in an automobile accident. Sundstrand Corporation's ("Sundstrand") medical plan, which is covered by ERISA, paid $25,831 toward the cost of the Blackburns' medical care. The Blackburns sued the other driver in Illinois state court and settled the case for $105,000. The Blackburns' lawyer received one-third of the settlement amount plus litigation expenses.

Pursuant to the ERISA plan's subrogation clause, Sundstrand was entitled to full reimbursement for the medical expenses paid by the plan. The Blackburns claimed that notwithstanding the plan's terms, the plan was entitled only to the amount of medical expenses minus one-third, for attorney fees, and a pro rata share

of the litigation expenses. The Blackburns filed a petition to apportion the settlement fund in the Illinois state court where their original tort suit had been filed.

Sundstrand removed the apportionment action to the United States District Court for the Northern District of Illinois, Western Division, based on federal question jurisdiction. District Court Judge Reinhard ruled in favor of Sundstrand on the grounds that the plan's terms were enforceable under ERISA and that the Illinois common-fund doctrine, on which the Blackburns relied, was preempted.

B. The Seventh Circuit Decision

On June 3, 1997 the United States Court of Appeals for the Seventh Circuit reversed and remanded the case to the District Court with instructions to remand the case to the state court. The Seventh Circuit held that federal jurisdiction was lacking and that ERISA did not preempt the Illinois common-fund doctrine.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO DETERMINE WHETHER A STATE COMMON-FUND DOCTRINE TAKES PRECEDENCE OVER THE SUBROGATION CLAUSE OF AN ERISA PLAN.

The Seventh Circuit's opinion directly opposes this Court's decisions in *FMC Corporation v. Holliday* and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*.

Certiorari should be granted to correct the harm caused by the Seventh Circuit's gross misapplication of this Court's reasoning in both *FMC Corporation v. Holliday*, 498 U.S. 52, 111 S.Ct. 403 (1990) and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 115 S.Ct. 1671 (1995). In *Holliday*, this Court carefully and thoroughly analyzed the interaction between ERISA's preemption clause and state laws governing subrogation, creating clear guidance for the lower courts. *Holliday*, 489 U.S. at 55, 111 S.Ct. at 405. This Court concluded that, where state law conflicts with the terms of an ERISA plan, "self-funded ERISA plans are exempt from state regulation insofar as that regulation 'relate[s] to' the plans." *Holliday*, 498 U.S. at 61, 111 S.Ct. at 409. Although this Court has decided seven ERISA preemption cases since *Holliday*,[2] none has cast any doubt on the continued vitality of *Holliday's* holding.

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[2] *De Buono v. NYSA-ILA Medical and Clinical Services*, ___ U.S. ___, 117 S.Ct. 1747, 1749 n.1 (1997).

Holliday's brightly marked path was not followed by the Seventh Circuit in the case below. The Seventh Circuit held that ERISA did not preempt the Illinois common-fund doctrine because the doctrine pre-dated ERISA and did not relate exclusively to ERISA plans. *Blackburn v. Sundstrand Corporation*, 115 F.3d 493, 495 (7th Cir. 1997). Thus the Seventh Circuit concluded that "the common-fund doctrine . . . is not at all like . . . a state anti-subrogation law which [*Holliday*] held preempted." *Id.* at 496. The Seventh Circuit's distinction will not withstand scrutiny, however, because *Holliday's* holding cannot be so narrowly circumscribed. Like the Illinois common-fund doctrine, the state law in *Holliday* had the direct purpose and effect of nullifying the ERISA plan's subrogation clause.

The Seventh Circuit also misconstrued this Court's recent decision in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Company* which recognized that a state law having "an indirect economic effect on choices made by insurance buyers" was not within the scope of ERISA preemption. *Travelers*, 115 S.Ct. at 1679. Here, notwithstanding the Seventh Circuit's gratuitous criticism of Sundstrand's economic choices, it is beyond peradventure that Illinois law directly interferes with, and indeed supersedes the terms of, Sundstrand's ERISA plan.

Instead of following this Court's leadership, the Seventh Circuit ignored this Court's analysis and has created a direct conflict. This Court should grant certiorari to limit the harm done by the Seventh Circuit's opinion and keep this area of law as clear as possible.

The circuits have ruled inconsistently on the power of state common-fund doctrines to override subrogation clauses of ERISA plans, creating non-uniform treatment of plans and plan participants.

The current state of the law on ERISA's preemption of the common-fund doctrine[3] has split the circuits. In dramatic fashion, the Third Circuit's 1996 decision in *Ryan by Capria-Ryan v. Federal Express Corporation*, 78 F.3d 123 (3rd Cir. 1996), held that the clear language of a plan's subrogation clause was enforceable, despite claims under the common-fund doctrine.[4] *Ryan* is in head-on conflict with the Seventh Circuit's opinion in the instant case. The Third Circuit reinforced its holding and analysis in *Ryan* with its very recent opinion, *Bollman Hat Company v. Root*, 112 F.3d 113 (3rd Cir. 1997), which also held that the common-fund doctrine may not override the unambiguous words of an ERISA plan. *Bollman*, 112 F.3d at 116. The injustice of such inconsistent rulings between circuits is practically self-evident. In a subrogation dispute occurring in the Third Circuit, an ERISA plan's subrogation clause will be given full effect

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[3] Some of the cases discussed in this section deal with the preemption of state "make-whole" doctrines, which purport to interfere with an ERISA plan's subrogation provision by prohibiting reimbursement for benefits paid out until the injured party is fully compensated for his or her loss. Under both the common-fund doctrine and the make-whole doctrine, the core issue is the same, *i.e.*, whether a state law may impinge upon the terms of an ERISA plan's subrogation provision.

[4] While both the Seventh Circuit's *Blackburn* opinion and the Third Circuit's *Ryan* opinion deal with the application of a common-fund doctrine to an ERISA plan's subrogation clause, the Third Circuit implicitly acknowledged that state law was preempted and thus viewed the common-fund doctrine as stemming from federal common law.

and the plan will enjoy complete dollar-for-dollar reimbursement. In contrast, the identical facts in the Seventh Circuit will result in a far lower reimbursement for the plan.

The Seventh Circuit's decision not only conflicts with the Third Circuit, but the Eighth, Ninth and Eleventh Circuits as well. *Waller v. Hormel Foods Corporation*, 120 F.3d 138 (8th Cir. 1997); *Barnes v. Independent Automobile Dealers Association of California Health and Welfare Benefit Plan*, 64 F.3d 1389 (9th Cir. 1995); *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997). Both the Eighth and Eleventh Circuits have issued 1997 opinions which hold that ERISA preempts state laws which affect the enforcement of a plan's subrogation clause. *Waller*, 120 F.3d 138; *Cagle*, 112 F.3d 1510. While these cases note that a poorly written subrogation clause may not be strong enough to overcome a common-law principle affecting subrogation rights, each decision unequivocally states that a clear and well written subrogation clause in an ERISA plan would negate any conflicting common law. *Waller,* 120 F.3d at 140; *Cagle,* 112 F.3d at 1521. The Ninth Circuit has issued a 1995 opinion with an identical holding and reasoning. *Barnes*, 64 F.3d 1389 (9th Cir. 1995).

Because of the deep split among the circuits, certiorari should be granted in this case.

The Seventh Circuit's decision erroneously interferes with ERISA's uniform federal regulatory scheme.

Certiorari should be granted so that the Seventh Circuit's erroneous decision may be overturned before it can

further undermine ERISA's regulatory scheme. ERISA § 514(a) states that ERISA shall preempt any and all state laws which "relate to" employee benefit plans. 29 U.S.C. § 1144(a). This Court has made clear that ERISA's preemptive scope is "clearly expansive."[5] In addition, this Court has decreed that a state law relates to an ERISA benefit plan if it has "a connection with or reference to such plan,"[6] and that a "connection" with an ERISA plan may be established through "the nature of the effect of the state law on ERISA plans."[7] Significantly, this Court has held that where a state law conflicts with "the provisions of ERISA or operates to frustrate its objects," the state law is preempted and an inquiry into the phrase "relates to" is not needed.[8] Since the Illinois common-fund doctrine directly conflicts with the subroga-

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[5] *De Buono v. NYSA-ILA Medical and Clinical Service*, ___ U.S. ___, 117 S.Ct. 1747, 1751 (1997) (citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)); *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A.*, ___ U.S. ___, 117 S.Ct. 832, 837 (1997) (citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 1676, 131 L.Ed.2d 695 (1995)).

[6] *De Buono*, ___ U.S. ___, 117 S.Ct. at 1751 (citing *Shaw v. Delta Airlines, Inc.* 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2899-2900, 77 L.Ed.2d 490 (1983)); *Dillingham*, ___ U.S. ___, 117 S.Ct. at 837 (citing *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (1992)); *Holliday*, 489 U.S. 52, 58, 111 S.Ct. 403, 407-08 (citing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)).

[7] *Dillingham*, ___ U.S. ___, 117 S.Ct. at 838 (citing *Travelers*, 514 U.S. at 656, 115 S.Ct. at 1677).

[8] *Boggs v. Boggs*, ___ U.S. ___, 117 S.Ct. 1754, 1760-61 (1997).

tion clause of Sundstrand's medical plan, and since the plan was created under ERISA which empowers the plan to contain such a subrogation clause, the Illinois common-fund doctrine undoubtedly operates to frustrate the objects of ERISA and to destroy specifically the objective of a uniform federal regime.

The Seventh Circuit concluded in its opinion below that the state law in question was "not about employee benefit plans," and supported its conclusion by observing that the common-fund doctrine predated both ERISA and employer-sponsored health plans. *Blackburn*, 115 F.3d at 495. This analysis veers far from the guidance provided by this Court and gives disproportional weight to the temporal relationship between a state law and the enactment of the ERISA statute. If the temporal relationship has the weight attributed to it by the Seventh Circuit, practically every rule of common law would undermine ERISA, as the predominant body of common law was developed well before the 1974 passage of ERISA. In addition, if every common law has the ability to undermine ERISA, the uniform regulatory scheme of this statute will be functionally nonexistent.

The Seventh Circuit's decision also was patently influenced by its own economic views as to the fairness and efficacy of Sundstrand's plan design. Yet Congress has left these issues of business judgment to the plan sponsors and has protected them from interference by state legislators and judges who might disagree. The Seventh Circuit's further comment, that Sundstrand could somehow draft its plan to avoid regulation under Illinois law, makes no sense. The Blackburns never questioned the interpretation of the plan but forthrightly

asserted that the common-fund doctrine took precedence. If Illinois law is not preempted, the common-fund doctrine will thwart any attempt to draft a plan which requires participants to bear the full burden of their legal fees and remit the first dollars of any tort recovery without any offset.

Finally, the need to protect ERISA's uniform regulatory system rises to a critical level when the volume of affected plan participants is considered. As of 1995, 19.5 million people were covered by fully self-funded health plans subject to ERISA.[9] If both fully self-funded and partially self-funded plans are taken into account, the number of participants jumps to 32.5 million.[10] The participants of any one plan may be spread across the United States and should not be subject to the vagaries of state law. In addition, plan sponsors, who offer health benefits on a purely voluntary basis, should not be required to comply with diverse state laws in the administration of their plans.

For all of the above reasons, the Seventh Circuit's decision should not be permitted to stand.

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[9] Martha Priddy Patterson and Derek Liston, KPMG Peat Marwick LLP, *Analysis of the Number of Workers Covered by Self-Insured Health Plans Under the Employee Retirement Income Security Act of 1974 - 1993 and 1995* (prepared for the Henry J. Kaiser Family Foundation, August 1996).

[10] *Id.*

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER FEDERAL JURISDICTION EXISTS OVER AN APPORTIONMENT ACTION WHICH IS INDEPENDENT OF THE UNDERLYING CASE, WHICH REQUESTS A DECLARATION OF A PARTICIPANT'S RIGHTS UNDER AN ERISA PLAN AND WHICH PURPORTS TO INVOKE STATE LAW TO NULLIFY THE TERMS OF AN ERISA BENEFIT PLAN.

The Seventh Circuit relied upon a superficial analysis to find that federal jurisdiction was improper and ignored the fact that the apportionment action was independent from the underlying case.

The Seventh Circuit's opinion states that "[t]he district court did not discuss the source of its subject-matter jurisdiction, and we conclude that it had none." *Blackburn*, 115 F.3d at 494. The district court did not discuss the issue of subject-matter jurisdiction because that issue was not raised by either party to the case nor did either party raise the issue on appeal. The issue of subject-matter jurisdiction arose solely through the Illinois State Bar Association's amicus brief to the Seventh Circuit. That brief incorrectly stated that mere conflict preemption was present in this case, not complete preemption.

The Seventh Circuit's erroneous conclusion was based on two lines of faulty reasoning. First, the Seventh Circuit stated that the district court did not have proper subject matter jurisdiction under 28 U.S.C. § 1441(b),[11]

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[11] "§ 1441. Actions removable generally (a) . . . (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, (continued...)

as the civil action at issue was the Blackburns' tort suit and not the petition to apportion the settlement proceeds. *Blackburn*, 115 F.3d at 494. This cursory analysis ignores the independence of the apportionment action from the tort suit, as the controversy under the apportionment action had no relationship to either the issue in the tort suit or the other driver, and Sundstrand's ERISA plan was never involved in the tort suit.

In erroneously concluding that the apportionment action was not independent from the tort suit, the Seventh Circuit's opinion also failed to address directly conflicting precedent. In the Third Circuit's *Bollman Hat* decision, 112 F.3d 113 (3rd Cir. 1997), the court explicitly stated that federal question jurisdiction was proper where the issue presented was the interaction of the common-fund doctrine with the language of an ERISA plan.[12] In *Trident Regional Health System v. Polin*, 948 F. Supp. 509 (D.S.C. 1996), where a hospital sued a former patient for the cost of medical care and the patient brought a third-party action against her ERISA medical plan, the plan was allowed to remove the entire

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[11] (...continued)
treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

[12] The Third Circuit found federal question jurisdiction was proper because it viewed the common-fund doctrine as arising from federal common law, not state common law as stated in the Seventh Circuit's opinion below. However, in the instant case, Plaintiffs and their amicus also relied on federal common law as an alternative basis for relief.

action to federal court. In *Clardy v. ATS, Inc. Employee Welfare Benefit Plan*, 921 F. Supp. 394 (N.D. Miss. 1996), a plaintiff secured settlement of a state court tort case and then filed a second state court case against her ERISA medical plan, seeking payment of unpaid medical bills. Again, the plan successfully removed the case to federal court. *See also, McIntosh v. Pacific Holding Company*, 928 F. Supp. 1464 (D. Neb. 1996), *rev'd on other grounds*, 120 F.3d 911 (8th Cir. 1997).

In the above cases, federal jurisdiction was proper even though the dispute over the rights of the ERISA plan was contingent upon the outcome of a tort claim based on a state law cause of action. This situation is identical to the instant case and yet the Seventh Circuit did not even mention this conflicting precedent.

The issue of federal jurisdiction has also been discussed in the context of garnishment actions. The issue of what constitutes an independent, and therefore removable, action was discussed by the Fifth Circuit in the 1979 case of *Butler v. Polk,* 592 F.2d 1293 (5th Cir. 1979). In *Butler*, the Fifth Circuit held that a post-judgment writ of garnishment in state court was removable because the action was an independent civil action due to the fact that a new party with different interests was involved. Again, this situation is identical to the instant case, where the ERISA plan was a new party with distinct interests. With the introduction of this new party, removal was proper, especially since the new party also introduced the federal ERISA scheme.

Federal jurisdiction exists over an apportionment action which determines a participant's rights under an ERISA benefit plan, under the doctrine of complete preemption, this Court's decision in *Metropolitan Life Insurance Company v. Taylor* and the proper application of federal common law within ERISA's statutory scheme.

Complete preemption clearly arises in this case as the Blackburns' original apportionment action was squarely within the scope of ERISA § 502(a) (29 U.S.C. § 1132(a)). The Blackburns' apportionment action sought to fix the ERISA plan's financial rights and obligations in light of the Blackburns' settlement with the other driver. This issue lies at the heart of any action to recover benefits or enforce rights under the plan, both of which fall within the scope of §502(a).

This Court outlined the rule of federal jurisdiction based on complete preemption in *Metropolitan Life Insurance Company v. Taylor*, 487 U.S. 58, 107 S.Ct. 1542 (1987). That case held that federal jurisdiction exists, based on complete preemption, where a state law claim is both subject to an ERISA preemption defense and comes within the scope of ERISA § 502(a) (29 U.S.C. § 1132(a)). The Seventh Circuit found that the Blackburns' apportionment action was not subject to the complete preemption doctrine as the action did not seek "to require Sundstrand's plan to pay additional benefits" or seek "a payment from the plan." *Blackburn*, 115 F.3d at 495. However, the Seventh Circuit ignored the practical effect of shifting a burden of attorney fees to the plan. It also ignored the fact that the Blackburns' apportionment action sought an adjudication of their rights under the plan—the precise issue addressed by ERISA

§ 502(a)(1)(B). Thus, their claim arose under ERISA and only ERISA.

Where gaps exist in ERISA's statutory scheme, federal common law, not state common law, should be relied upon. *Mohame v. Kerr*, 53 F.3d 911, 913 (8th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 185 (1995). Therefore, the common-fund doctrine at issue in this case should have been viewed not as a state law issue but a federal law issue, creating federal jurisdiction. The Blackburns themselves acknowledged that this case may hinge upon federal common law. In their brief to the Seventh Circuit, the Blackburns argued in the alternative, that if state common law was preempted, they would fall back on federal common law. Since the Blackburns themselves attempted to rely on federal law, there can be no doubt that federal jurisdiction exists over the claim.

Whether federal jurisdiction arises from an apportionment action which determines a participant's rights under the terms of an ERISA benefit plan presents an important question of federal law which should be decided by this Court.

The instant case is a garden variety controversy. The many plan participants affected by this issue may be denied equitable and consistent resolutions to their controversies as long as the question of federal jurisdiction remains unsettled. In *Taylor*, this Court assured that plan administrators would have access to a federal forum for ordinary benefit claims, despite plaintiffs' artful attempts to frame the issue under state law. 481 U.S. 58, 67, 107 S.Ct. 1542, 1548 (1987). This Court's in-

tervention is needed once again, to assure that a federal forum is available to resolve run-of-the-mill subrogation claims affecting numerous ERISA plans.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: September 26, 1997

APPENDICES

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

RONALD BLACKBURN AND
BARBARA BLACKBURN, Plaintiffs-Appellants,

v.

SUNDSTRAND CORPORATION, Defendant-Appellee.

Argued April 2, 1997

Decided June 3, 1997

No. 96-3158

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 96 C 50027—Philip G. Reinhard, Judge.

Before WOOD, JR., COFFEY, and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

Ronald and Barbara Blackburn were injured in an automobile accident. Sundstrand Corporation's welfare benefit plan, which is covered by ERISA, paid $25,831 toward the costs of the Blackburns' medical care. They

filed suit in an Illinois court against the driver of the other car and accepted $105,000 in settlement. Two parties, in addition to the Blackburns, have claims against the $105,000 fund: the Blackburns' lawyer is entitled by a contingent-fee contract to a third of the money, plus costs, and Sundstrand is entitled by virtue of a subrogation clause in its medical-care plan to reimbursement from any judgment. The Blackburns filed in state court a petition to apportion the fund. They asked, in particular, that a portion of their attorney's fee and expenses be charged against the amount due to Sundstrand, so that a net payment of $17,048 would be deemed to satisfy its subrogation right. At this point Sundstrand removed the case to federal court, which entered a judgment directing the Blackburns to remit the full $25,831. 933 F.Supp. 724 (N.D. Ill. 1996). According to the district court, the Illinois common-fund doctrine—under which attorneys who generate a fund are entitled to be paid from that fund, and the beneficiaries are entitled only to the proceeds net of legal expenses—is preempted by § 514(a) of ERISA, 29 U.S.C. § 1144(a).

The district court did not discuss the source of its subject-matter jurisdiction, and we conclude that it had none. Sundstrand removed the case under 28 U.S.C. § 1441(b), which covers "[a]ny civil action of which the district courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States." The "civil action" was the tort suit by the Blackburns against the other driver, which assuredly did not arise under the Constitution, treaties, or laws of the Untied States. Not even the most expansive reading of ERISA covers motor vehicle collisions,

just because part of the recovery may inure to the benefit of a plan. The petition to apportion the fund invoked the ancillary jurisdiction of the state court and was part of that original, non-removable action.

Even if we were to treat the petition as inaugurating a separate "civil action," removal would have been improper. The fundamental claim—that the Blackburns should be credited, for purposes of their duty to reimburse Sundstrand, with sums paid to the attorney whose work produced the fund—arises under state law. Sundstrand has at most an argument that ERISA preempts application of the state's common-fund rule. Yet it has been understood for a very long time that a federal defense to a claim arising under state law does not create federal jurisdiction and therefore does not authorize removal. This is true of defenses under ERISA no less than of defenses under other federal statutes. *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995). Rice holds that a claim of preemption under § 514(a), in particular, does not permit removal. Removal under the diversity jurisdiction and § 1441(a) also is impossible, for the amount in controversy is less than $9,000.

A separate doctrine, misleadingly called "complete preemption," does permit removal when the plaintiff's own claim depends on ERISA, and the effort to craft a claim under state law reflects artful pleading. *See Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Bartholet v. Reishauer AG (Zurich)*, 953 F.2d 1073 (7th Cir. 1992). Section 502 of ERISA, 29 U.S.C. § 1132, provides the sole authority for a participant's claim to benefits from a welfare or

pension plan. Thus if the Blackburns had sought to require Sundstrand's plan to pay additional benefits, their claim would have arisen under ERISA, and Sundstrand could have removed it. But neither the original tort action nor the petition to adjudicate adverse claims to the settlement fund sought a payment from the plan. Section 502 is irrelevant; Sundstrand's arguments (and the district court's judgment) rest exclusively on § 514(a); and for the reasons developed in Rice defenses of this kind do not support removal under § 1441(b).

Yet another consideration shows that the district court lacked jurisdiction: the Illinois common-fund doctrine is not preempted, so even if § 514(a) sometimes supported removal, Sundstrand would not be assisted. The status of the state's common-fund doctrine is a recurring question that should be clarified, and the district court's decision creates a conflict between state and federal courts in the same jurisdiction. *Scholtens v. Schneider*, 173 Ill. 2d 375, 219 Ill.Dec. 490, 671 N.E.2d 657 (1996), holds that § 514(a) does not preempt the common-fund doctrine. We agree with Scholtens.

Section 514(a) preempts state laws "insofar as they . . . relate to any employee benefit plan". Illinois's common-fund doctrine, like its parallel in federal law, e.g., *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), is not about employee benefit plans. The common-fund doctrine long predates not only ERISA but also employer-sponsored health plans. Most applications have nothing to do with health insurance in general, or employer-sponsored plans in particular. The doctrine could be thought "related" to an "employee benefit plan" only in the trivial

sense that, "as many a curbstone philosopher has observed, everything is related to everything else." *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, ___ U.S. ___, ___, 117 S.Ct. 832, 843, 136 L.Ed.2d 791 (1997) (Scalia, J., concurring).

Although crediting plan participants with payments so counsel will reduce the plan's income from the Blackburns' suit, a state law is not "related" to a plan just because it affects the net amounts the plan pays for health care. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995), holds that § 514(a) does not preempt a state tax on medical services, even though a majority of all health care is purchased these days by ERISA plans. The tax was on the medical care, not on the plans; so, here, the common-fund doctrine provides compensation for work done to create the fund; it is indifferent (does not "relate") to the basis of any particular claim to the fund. Illinois law may even increase the plan's recoveries in the long run. Subrogation clauses are not self-enforcing, and one way or the other recoveries must be paid for. Sundstrand could have hired lawyers to sue the driver who injured the Blackburns, but its net recovery might have been even lower than the $17,048 left after paying the Blackburns' lawyer. (Lower because there are economies in prosecuting all claims arising out of the accident through one lawyer.) Presumably Sundstrand would not argue that ERISA preempts the state law of contracts, which requires it to pay its lawyers. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995). The common-fund rule amounts to

the same thing, requiring a party that constructively hires a lawyer to pay for successful work. Sundstrand alternatively could have used its in-house counsel to pursue the driver, but diversion of these lawyers' time from other tasks has an opportunity cost that could be substantial. *See Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co.*, 76 F.3d 114 (7th Cir. 1996). But if preemption of the common-fund doctrine meant that injured persons could not charge legal costs against recoveries, people like the Blackburns would in the future have every reason to disclaim any demand for medical expenses in tort suits, throwing on plans the burden and expense of collection.

Application of the common-fund doctrine therefore is not at all like application of a state anti-subrogation law, which *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990), held preempted. The law at issue in Holliday was directed at group health care plans, which made for a much closer "relation" than that of common-fund doctrine to ERISA plans. The common-fund doctrine is general; its effect on plans is incidental. A plan might have a better argument if its governing documents expressly required participants to pay their own legal fees (alternatively, to hire only attorneys who agree to waive the common-fund doctrine) and to remit the gross rather than the net proceeds from litigation. ERISA permits a medical plan to pay a fraction of the costs, requiring a copayment from the beneficiary. *Kennedy v. Connecticut General Life Insurance Co.*, 924 F.2d 698 (7th Cir. 1991). A plan that nominally pays 100 percent of medical costs incurred following accidents, and then requires participants to hire counsel, initiate litigation, and remit any recovery (bearing costs of counsel

themselves), has effectively agreed to insure only part of the real cost of care, although it advances the full cost while the participant tries to find other sources of payment. A plan may decide to accept the copayment in kind (via legal services) rather than in cash. A state's refusal to respect such a provision might be deemed equivalent to a direction that the plan pay all, rather than part, of the medical costs of accidents. But Sundstrand's plan does not have such a requirement, Illinois has not attempted to override it, and there will be time to cross that bridge when we come to it.

The judgment of the district court is vacated, and the case is remanded to the district court with instructions to remand this action to state court.

APPENDIX B

In the
United States District Court
for the Northern District of Illinois
Western Division

July 29, 1996

No. 96 C 50027

RONALD BLACKBURN AND
BARBARA BLACKBURN, Plaintiffs,

v.

BRYAN BECKER, Defendant,

RONALD BLACKBURN AND
BARBARA BLACKBURN, Petitioners,

v.

SUNDSTRAND CORPORATION, Respondent.

MEMORANDUM OPINION AND ORDER

REINHARD, *District Judge*.

Petitioner, Ronald and Barbara Blackburn, filed a petition to adjudicate subrogation claim in the circuit court

of Winnebago County naming as respondents, Sundstrand Corporation. Respondent removed the petition to adjudicate to this court.[1] Jurisdiction arises under the Employee Retirement and Income Security Act (ERISA), 29 U.S.C. 1444, et seq., and venue is proper as the ERISA plan at issue is administered in this district and division, see 29 U.S.C. § 502(e)(2).

The facts are taken from the allegations in the petition to adjudicate. Petitioners filed suit against Bryan Becker and, as a result of that suit, obtained a settlement consisting of $100,000 for Ronald Blackburn's personal injuries and $5,000 for the personal injuries of Barbara Blackburn. Both petitioners were covered by an ERISA plan (plan) including medical and hospitalization insurance provided by respondent. Respondent, under the plan, paid $26,830.92 for medical expenses incurred by petitioners.

Petitioners' attorneys, pursuant to a written contingency fee agreement, received one-third of the settlement plus $1,125.87 in litigation expenses. Pursuant to the plan, respondent had a right of subrogation in the amount paid out for medical expenses incurred by petitioners. In December 1995, petitioners advised respondents that they were willing to reimburse respondent for its subrogation claim minus one-third for attorney fees and a pro-rata share of the litigation expenses in accordance with the Illinois "common fund doctrine."

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[1] The petitioners were plaintiffs in a suit for personal injuries arising out of a motor vehicle collision. Those claims were settled and, hence, only the petition to adjudicate was removed as it was the only matter remaining.

In turn, respondent refused petitioners' request for reimbursement of their attorney fees and pro-rata litigation expenses, contending that the common fund doctrine under Illinois law is preempted by ERISA. Petitioners, in response, filed their petition to adjudicate, arguing that under Illinois law the common fund doctrine applies notwithstanding that ERISA preempts state law. Alternatively, petitioners also contend that even if ERISA preempts the Illinois common fund doctrine, several federal district courts have created a rule of federal common law that entitles the recipient of a tort judgment or settlement to reduce by one-third the amount of reimbursement owed under an ERISA subrogation clause.

Petitioners seek to have their obligation to reimburse under the plan for the medical expenses paid out reduced by one-third for the attorney fees they paid in recovering settlements from the third-party tort-feasor. They do so by asserting two different theories: (1) that the Illinois common fund doctrine is not preempted by ERISA and that it should apply to reduce respondent's subrogation claim by one-third; and (2) that even if ERISA preempts the Illinois common fund doctrine, the federal common law provides for such a reduction. The court will address each of these assertions in turn.[2]

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[2] As preliminary matters, the court grants respondent's motion for leave to file as additional authority *Ryan v. Federal Express Corp.*, 78 F.3d 123 (3d Cir.1996). The court also grants petitioners' motion for leave to file as additional authority the amicus brief filed by the Illinois State Bar Association before the Illinois Supreme Court in *Scholtens v. Schneider*, 274 Ill.App.3d 102, 210 Ill.Dec. 580, 653 N.E.2d 775 (1st Dist.1995), *leave to appeal allowed*, 164 Il1.2d 583, 214 Ill.Dec.

(continued...)

I.) Illinois Common Fund Doctrine and Preemption

Section 514(a) of ERISA provides that "[e]xcept as provided in subsection (b) of this section [the saving clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state law insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The preemption clause establishes as an area of exclusive federal concern the subject of every state law that relates to an employee benefit plan governed by ERISA. *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990). In giving definition to the term "relates to," the Supreme Court has recently stated that it is necessary to "go beyond the unhelpful test" of the statute and "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, ___, 115 S.Ct. 1671, 1677, 131 L.Ed.2d 695 (1995). The Supreme Court has held that Congress, in passing section 514(a), intended that plans and plan sponsors be subjected to a uniform body of benefits law. *Id.* (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 484, 112 L.Ed.2d 474 (1990)). Congress's goal was to minimize the administrative and financial burden of complying with conflicting directives among states or

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[2] (...continued)
331, 660 N.E.2d 1280 (1996). In allowing the amicus brief to be submitted, however, the court notes that it will not consider the arguments contained therein, but rather, will only look to the citation of authority to the extent it bears on the issues before this court.

between states and the federal government and to prevent the potential for conflict in substantive law and requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. *Id.* In other words, the basic thrust of the preemption clause was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans. *Id.*, ___ U.S. at ___ - ___, 115 S.Ct. at 1677-78.

The issue here is whether the Illinois common fund doctrine relates to the plan to the extent its application to reduce the subrogation claim of the plan would interfere with the nationally uniform administration of such plans. It is clear that a state's antisubrogation law, that is, a law that prohibits subrogation by a plan, is preempted by ERISA. *FMC Corp.*, 498 U.S. at 58-61, 111 S.Ct. at 407-09. The Illinois common fund doctrine, however, is not an antisubrogation law. While it has a potential impact on a plan's right to subrogation, it does not act to prohibit such a claim. Thus, FMC Corp. does not entirely resolve the preemption issue.

The parties here dispute the import of *Land v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund*, 25 F.3d 509 (7th Cir.1994). In that case, the Seventh Circuit stated in unequivocal terms that "[b]ecause ERISA supersedes any and all state laws relating to covered plans, however, (see 29 U.S.C. § 1444(a)), [the Illinois common fund doctrine] is not available to [the plaintiff], and the terms of the plan require reimbursement of the entire amount without the deduction of any attorney's fees." *Land*, 25 F.3d at 511. Petitioners characterize this statement as

dictum because the issue of whether ERISA preempts the Illinois common fund doctrine was not raised by the plaintiff on appeal, because the statement is found in the "background" section near the front of the opinion and because the statement is unsupported by any analysis or citation of authority. Respondent, on the other hand, describes the statement as a holding which preclusively governs the issue in this case.

Certainly, if the statement is not dictum, it drives a stake through the heart of petitioners' non-preemption argument. Dictum has been defined by the Seventh Circuit as a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding. *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir.1988). Because it is peripheral, it may not have received the full and careful consideration of the court that uttered it. *Id.* Put another way, dictum is a remark or an aside concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication. *Id.* Alternatively, the Seventh Circuit has looked to what is at stake in distinguishing dictum from a holding. *Id.* In that regard, the court of appeals explained that a court should ask what reasons there are against giving weight to a passage found in a previous opinion such as whether the passage was unnecessary to the outcome, whether it was an integral part of the earlier opinion, whether it was grounded in the facts of the case and whether the issue addressed in the passage was not presented as an issue. *Id.* at 292-93.

Applying the Seventh Circuit's prior definition of dictum to the statement in Land, the court concludes

that it is dictum. While a seemingly clear statement of law, it does not appear the statement pertains to an issue actually raised on appeal. Nor was the statement necessary to the disposition of the issues that were raised. Further, the lack of analysis and citation of authority, while not dispositive on the question, lends further support for the conclusion that the statement is dictum and, hence, not binding on this court.[3]

Nevertheless, because the statement is nonbinding dictum does not render it impotent. Such a clear and direct statement of law by the Seventh Circuit is, at the very least, persuasive on the issue. Admittedly, its persuasive weight is somewhat diluted by the fact it was made prior to the Supreme Court's most recent discussion of the "relates to" language in the preemption clause. *See Travelers*, 514 U.S. at ___ - ___, 115 S.Ct. at 1677-78. It nonetheless remains persuasive as the proposition is consistent with the Supreme Court's discussion of preemption in Travelers.

Looking to Travelers, this court finds the Illinois common fund doctrine to be preempted by ERISA to the extent an employee seeks to have his or her obligation to repay medical expenses pursuant to a plan provision such as the one at issue here reduced by one-third based on the employee's payment of attorney fees. If the Illinois common fund doctrine could be applied as asserted by petitioners here, an ERISA plan would be subjected to a multiplicity of such state laws which would result in a

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[3] Another district court has also recently interpreted the statement in Land to be dictum. *See Carpenter v. Modern Drop Forge Co.*, 919 F.Supp. 1198, 1205-06 (N.D.Ind.1995).

nonuniform administration of such plans. Application of the common fund doctrine would require plans that contain such subrogation clauses and related employer conduct to be tailored to the peculiarities of the law of each jurisdiction. *See Sims v. Ewing*, No. 3-91-0264, at p. 12 (M.D.Tenn. Aug. 20, 1993) (unpublished order).[4] This would clearly run afoul of Congress's purpose and goal in enacting ERISA.[5]

II.) Federal Common Law

There is no doubt about the authority of the federal courts to create common law for use in ERISA cases. *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1296-97 (7th Cir.1993). Because ERISA sets forth none of its own principles of interpretation, courts have to adopt "some"

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[4] This unpublished decision was provided to the court and petitioners by respondent.

[5] This conclusion is unaffected by the holding of the Illinois appellate court in *Scholtens v. Schneider*, 274 Ill.App.3d 102, 210 Ill.Dec. 580, 653 N.E.2d 775 (1st Dist.1995), leave to appeal allowed, 164 Ill.2d 583, 214 Ill.Dec. 331, 660 N.E.2d 1280 (1996). The court simply need not follow the Illinois appellate court's opinion on a matter which is purely one of federal law. Moreover, the court does not agree with the Illinois appellate court's conclusion that the common fund doctrine "only tangentially or remotely impacts upon the plan and does not threaten federal uniformity." *Scholtens*, 210 Ill.Dec. at 583, 653 N.E.2d at 778. Additionally, the reasoning of the Illinois appellate court is somewhat suspect as it does not mention the *Travelers* decision, a case decided several months before *Scholtens*. While the court also recognizes that the Illinois Supreme Court has granted leave to appeal in *Scholtens*, a statistically rare occurrence, it draws no inferences as to the soundness of *Scholtens* on that basis.

interpretive principles in order to construe ERISA plans. *Id.* at 1297. These principles, because they are judge-made, constitute common law. *Id.* Such interpretive rules, however, can be overridden by clear language in the plan. *Id.* at 1298-99.

Petitioners in this case have pointed to a line of district court cases, none of which this court need follow, *see Old Republic Ins. Co. v. Chuhak & Tecson, P.C.*, 84 F.3d 998, 1003 (7th Cir.1996) (district court decisions are non-precedential), which fashioned a federal common law rule allowing for a one-third reduction in the amount reimbursed to a plan under a subrogation provision. *See Cutting v. Jerome Foods, Inc.*, 820 F.Supp. 1146, 1155 (W.D.Wis.1991), *aff'd on other grounds*, 993 F.2d 1293 (7th Cir.1993); *Serembus v. Mathwig*, 817 F.Supp. 1414, 1423 (E.D.Wis.1992); *Dugan v. Nickla*, 763 F.Supp. 981, 984-85 (N.D.Il1.1991). The court is unpersuaded by these cases for several reasons. First, it is entirely inconsistent for this court to rule that ERISA preempts the Illinois common fund doctrine from permitting a reduction in the subrogation amount for attorney fees only to turn around and fashion a federal common law rule that does exactly the same thing. While the court is aware of the significant difference between a state law affecting ERISA and a federal law doing so, the practical inconsistency is difficult to ignore.

Second, and perhaps more importantly, a straightforward provision requiring reimbursement for medical expenses by an employee who recovers from a third-party, such as the one at issue here, calls for no interpretive rules to be crafted by the federal court. There is nothing about such a provision that is ambiguous or in

need of interpretation. It calls for reimbursement. *See Ryan v. Federal Express Corp.*, 78 F.3d 123, 127 (3d Cir. 1996) (unambiguous subrogation provision calling for employee to pay back all money received in settlement from third party does not require common law application absent showing common law is necessary to effectuate ERISA policy). Petitioners point to nothing in the language to support that such reimbursement should be anything less than full.

Third, and most importantly, the provisions of the plan, including the subrogation one at issue here, were bargained for by the parties. While there is some appeal to the reasoning of the district court in Dugan, and embraced by the district courts that later visited the issue, that had the employee not engaged an attorney and pursued the case the fund would not have recovered any of the benefits paid the employee, *see Dugan*, 763 F.Supp. at 984, such a circumstance is insufficient to warrant an otherwise unambiguous and bargained-for-provision being modified. It should surprise no one, the employee or the employer, that the employee will seek compensation for his injuries beyond that provided for in the plan. Nor should it surprise anyone, especially in this day and age, that he will utilize a lawyer to do so. *See Testa v. Village of Mundelein*, 89 F.3d 443, 444 (7th Cir.1996) (noting that ours is a "litigious society").[6] Even more unsurprising is that the employee will fork over one-third of his recovery to the attorney. Given those common understandings, there is no reason to fiddle

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[6] *See Testa v. Village of Mundelein*, 89 F.3d 443, 444 (7th Cir. 1996) (noting that ours is a "litigious society").

with an unambiguous plan provision which the parties freely entered into. *See Ryan*, 78 F.3d at 127-28, (it is inequitable to permit employee to partake of plan benefits then, after receiving substantial settlement, invoke common law as justification for refusal to satisfy his end of the bargain). The court respectfully disagrees with the contrary conclusion of the district courts in Dugan, Serembus and Cutting. Accordingly, the court finds that petitioners are required to reimburse the plan in the full amount of the medical expenses, $26,830.92.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 1, 1997

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

RONALD BLACKBURN and BARBARA BLACKBURN,

Plaintiffs-Appellants,

No. 96 - 3158 v.

SUNDSTRAND CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 96 C 50027—Philip G. Reinhard, Judge.

Order

Defendant-appellee filed a petition for rehearing and suggestion of rehearing en banc on June 17, 1997. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

(2)

Supreme Court, U.S.
FILED
OCT 29 1997
CLERK

No. 97-556

In The

Supreme Court of the United States

October Term, 1996

SUNDSTRAND CORPORATION,

Petitioner,

vs.

RONALD BLACKBURN and BARBARA BLACKBURN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May a motion filed at the end of a state court personal injury suit, seeking to enforce a state law governing apportionment of the proceeds, be removed to federal court on the theory that ERISA conflict preemption creates a federal defense to the state law claims and so warrants the exercise of federal question jurisdiction?

2. Does ERISA enable an employee benefit plan to recover proceeds of a state tort suit from one of its beneficiaries without paying the attorney fees and other legal expenses that were needed to recover the tort damages as required by the state common law doctrine of common fund regardless of whether the subrogation language in the plan documents provides for recovery without deduction of fees or is silent regarding the deduction of fees?

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APPENDIX

Appendix A — Petition to Adjudicate Subrogation Claim Dated January 4, 1996 ..... 1a

Appendix B — Notice of Removal Filed February 2, 1996 ..... 6a

STATUTES INVOLVED

The following statute is in addition to those cited and set forth verbatim in petitioner's petition:

28 U.S.C. § 1331 states as follows:

> § 1331. Federal question
>
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

A. Facts

The facts in this case are derived from the respondents' petition to adjudicate subrogation claim and petitioner's notice of removal. *App. A and App. B respectively.*[1] No evidence or testimony was presented in the district court. And, petitioner never made its subrogation provision or plan documents part of the court record.

Respondents suffered injuries in a motor vehicle collision. At the time of the collision, they were covered by petitioner's ERISA employee benefit plan. The plan paid $25,831 in medical expenses for their treatment. Petitioner claimed subrogation rights.

In seeking compensation for their losses, respondents retained legal counsel. They entered into the standard contingency fee contract, agreeing to pay their attorneys one-

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1. References to the Appendix are cited as "App. __."

third of any settlement, plus reimbursement of expenses. Their attorneys filed a personal injury lawsuit in Illinois state court against the tortfeasor. During the course of the litigation process, the respondents became liable for $1,125.87 in litigation expenses needed by their attorneys to prosecute the lawsuit against the tortfeasor.

The respondents' attorneys successfully concluded the litigation short of trial. Respondent Ronald Blackburn's recovery was $100,000 and respondent Barbara Blackburn's recovery was $5,000. The settlement of the lawsuit was obtained entirely through the legal efforts and financial expenditure of the respondents' counsel. At no time did petitioner or its attorneys ever aid or otherwise contribute to the creation of the settlement. Petitioner did not intervene in the lawsuit or file its own lawsuit. In sum, the respondents' counsel created a fund in the amount of $105,000 for their clients after successfully concluding the civil litigation.

Respondents' counsel advised petitioner that in satisfaction of its subrogation rights, his clients would reimburse petitioner less attorney fees of one-third and a pro rata share of litigation expenses in accordance with the Illinois common fund doctrine.

In response, petitioner refused to pay any attorney fees and litigation expenses on its subrogation recovery, but instead wanted to be reimbursed at no expense. Petitioner insisted that, regardless of a state law that protects insured parties against insurers who seek to deprive them of compensatory damages gained through tort litigation by demanding litigation proceeds without taking account of the cost of the litigation, ERISA gives employee benefit plans the unconditional power to enforce subrogation clauses against their beneficiaries.

B. Proceedings Below

Shortly thereafter, counsel for the respondents filed a verified petition in their personal injury lawsuit requesting the court to reduce petitioner's subrogation recovery by one-third plus a proportionate share of litigation expenses. *App. A.* In their petition, respondents acknowledged the existence of petitioner's subrogation rights and sought application of the Illinois common fund doctrine to reduce petitioner's recovery. *App. A.* Petitioner responded by filing a notice of removal to federal district court. *App. B.* In this regard, petitioner contended that, because Illinois law was allegedly in conflict with ERISA, its preemption defense created federal question jurisdiction. Although petitioner relied on its subrogation provision to require full reimbursement, it never made the plan documents or the terms of the subrogation provision part of the court record.[2]

Notwithstanding the absence of any factual record showing that the subrogation clause required that state law be overridden, the district court gave judgment for petitioner. *Blackburn v. Sundstrand Corporation*, 933 F. Supp. 724 (N.D. Ill. 1996). It did not discuss the issue of federal jurisdiction, but rather assumed that jurisdiction was appropriate under ERISA. Turning to the issue of preemption, it recognized that because the Illinois common fund doctrine is not an anti-subrogation law, its application was not precluded by this Court's decision in *FMC Corporation v. Holliday*, 498 U.S. 58 (1990). But the court felt compelled by a dictum in a Seventh Circuit decision, *Land v. Chicago Truck Drivers, Helpers and Warehouse Union Health and Welfare Fund*, 25 F.3d 509 (7th Cir. 1994), to conclude that ERISA supersedes the common fund doctrine. Finally, it refused to follow several decisions by other district courts in the Seventh

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2. Petitioner misstates the record at page 3 of its petition where it states the subrogation provision entitled it to full reimbursement. There is no evidence in the record that the terms of the subrogation provision provided for full reimbursement.

Circuit which, under federal common law, adopted an interpretive principle pursuant to which subrogation clauses would be enforced consistent with the common fund doctrine absent clear language in the plan documents overriding that doctrine. Rather, it placed the burden on respondents to show that language in the subrogation clause permitted them to deduct attorney fees before repaying medical expenses.

In a unanimous decision authored by Judge Easterbrook, the court of appeals reversed. It first noted the district court's failure to discuss the sources of subject matter jurisdiction, and found that there was no jurisdiction. *Blackburn v. Sundstrand Corporation*, 115 F.3d 493 (7th Cir. 1997). It noted that in *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court had held that preemption defenses under ERISA does not create federal jurisdiction. This case, Judge Easterbrook concluded, involved conflict preemption under ERISA section 514(a), not complete preemption of a state law claim that actually depends on ERISA as in *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 55 (1987), and accordingly the proffered preemption defense did not create a basis for removal.

Moreover, the court held, removal based on preemption was improper because the Illinois common fund doctrine was not preempted.[3] Judge Easterbrook provided two reasons for this conclusion. First, the common fund doctrine predates ERISA

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3. The Illinois common fund doctrine permits a party who creates, preserves or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for attorney fees and litigation expenses. *Brundidge v. Glendale Federal Bank FSB*, 168 Ill. 2d 235, 238, 659 N.E. 2d 909, 911 (1995). It is a common law rule of general application which does not single out or refer to ERISA plans, but rather applies to all funds created, increased or preserved by a party in which others have an ownership interest. *Scholtens v. Schneider*, 173 Ill. 2d 375, 386, 671 N.E. 2d 657, 663 (1996).

and was not directed at employee benefit plans; it does not "relate to an employee benefit plan" as required for the application of section 514(a). Second, the Illinois common fund doctrine represents a sensible way of ensuring that petitioner pay for the benefit of receiving reimbursement under its subrogation clause. For example, had petitioner hired its own counsel to pursue the tortfeasor who caused respondents' injuries, it could not have argued that ERISA preempted its contractual obligation to pay its own lawyer. And yet, if preemption of the common fund doctrine meant that injured persons could not charge legal costs against their recoveries, they would be encouraged to refrain from demanding medical expenses in tort suits, thus forcing plans to hire their own counsel to enforce such claims.[4]

The court noted that it was not addressing the question of whether an employee benefit plan could word its plan documents in a way that avoided the common fund doctrine. If the

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4. The following illustrations based on a $20,000 liability insurance coverage limit, settlement for the $20,000 coverage limit, $12,000 in medical expenses, $1,000 in litigation expenses and standard one-third contingency fee contract are contained at page 23 of respondents' brief to the Seventh Circuit. Without the common fund doctrine, there are the following recoveries:

Plan	12,000.00
Attorney Fee	6,666.00
Expenses	1,000.00
Victim	334.00

In contrast, application of the common fund doctrine would provide the following recoveries:

Plan	7,400.00
Attorney Fee	6,666.00
Expenses	1,000.00
Victim	4,934.00

subrogation provision contained express language requiring participants to seek to recover medical costs from tortfeasors and requiring them to waive application of the common fund doctrine, a state might be precluded from overriding such specific language. But because those facts were not presented in this case, the court left that question to another day.

REASONS FOR DENYING THE WRIT

As in many states, Illinois common law of insurance has developed a means of protecting insured parties against unduly harsh enforcement of subrogation clauses by requiring that, when an insured recovers compensatory damages which include the medical expenses which their health insurance has paid, the insurer's subrogation claim is subject to the same limitations as the injured party — that is, the requirement of paying the costs of securing the recovery. And far from the decision below being in conflict with the run of decisions in other federal and state courts, as petitioner contends, the courts have developed a fairly broad consensus that, in the absence of subrogation language specifically overriding common law doctrines protecting the insured, those protections must be honored. Nothing in the record shows that this general rule was improperly applied here. And other federal courts have not held, as petitioner contends, that ERISA preemption defenses based on section 514(a) create federal jurisdiction and that ERISA preempts a state common fund doctrine. Thus, because there is no conflict neither among the lower courts nor between the decision below and previous decisions of this Court, and because petitioner failed to provide a factual basis on which the consensus rule on the construction of subrogation provisions could be applied, the petition for a writ of *certiorari* should be denied.

Before any consideration of whether this Court should grant the petition concerning ERISA's preemptive scope over a state

common fund doctrine or whether application of the common fund doctrine was appropriate based on the factual record, this Court must first conclude federal jurisdiction exists. Clearly, petitioner's defense against the respondents' state court apportionment proceeding is ERISA's supersedure provision found in section 514(a). This Court in *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) reiterated well established federal jurisdiction law. Where no diversity of citizenship jurisdiction exists, as in the present case, the propriety of removal turns on whether the case falls within the scope of the original federal question jurisdiction under 28 U.S.C. § 1331. *Franchise Tax Board*, 463 U.S. at 8. This Court in *Franchise Tax Board* stated that under the "well pleaded complaint" rule as articulated in *Louisville & Nashville Railroad Company v. Mottley*, 211 U.S. 149 (1908), a defendant may not remove such a case to federal court unless plaintiff's complaint shows that the case arises under federal law defined by section 1331, and it may not be removed on the basis of a federal defense. *Franchise Tax Board*, 463 U.S. at 10. *Franchise Tax Board* held that removal on the basis of a federal defense, specifically ERISA section 514(a) preemption, does not confer federal subject matter jurisdiction. *Franchise Tax Board*, 463 U.S. at 13-14. Since this Court has previously considered whether ERISA section 514(a) confers complete preemption jurisdiction and has declined such an extension, there is no reason for the Court in this case to reconsider its previous ruling, especially since no conflicts exist among the lower courts.

There are no conflicts among the circuits over federal common law providing for a basis of federal jurisdiction in conflict preemption removal under ERISA section 514(a). In *Ryan v. Federal Express Corporation*, 78 F.3d 123 (3d Cir. 1996), the Third Circuit failed to consider altogether state law and ERISA's preemptive scope of it under section 514(a). Preemption was not even an issue in the case. Rather, the court

and the parties believed federal common law was at issue and the case was decided on that basis. *Bollman Hat Company v. Root*, 112 F.3d 113 (3d Cir. 1997) is not a removal case. Consequently, conflict preemption jurisdiction under ERISA is not an issue. In *Bollman Hat Company*, the ERISA plan brought suit in federal district court seeking full reimbursement for its subrogation recovery. The Third Circuit found federal jurisdiction under federal common law because the terms of the subrogation provision were in dispute, that is, whether an ambiguity existed. *Bollman Hat Company*, 113 F.3d at 116. In the present case, petitioner did not even bother to place the plan documents or the subrogation provision into evidence. No court in this case has seen the subrogation provision, let alone interpreted it. Consequently, federal common law in the present case is inapplicable. The Eight Circuit's decision in *Mohame v. Kerr*, 53 F.3d 911 (8th Cir. 1995) does not conflict with the present case. Conflict preemption was not an issue because potential beneficiaries were seeking benefits under the ERISA plan. Consequently, the court had jurisdiction under ERISA section 502(a)'s complete preemption jurisdictional doctrine. *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58 (1987).

The present decision is not the case to accept *certiorari* to determine whether a defense of ERISA conflict preemption in a state court apportionment proceeding warrants an extension of federal question jurisdiction because there is an incomplete factual record (subrogation provision and plan documents absent from the record) and resort to federal common law was not required. Furthermore, conflicts do not exist among the circuit courts over federal common law providing a basis for federal question jurisdiction in ERISA conflict preemption cases.

No conflicts exist among the circuit courts over ERISA preempting a state common fund law. Cases cited by petitioner,

Barnes v. Independent Automobile Dealers Association of California Health and Welfare Benefit Plan, 64 F.3d 1389 (9th Cir. 1995) and *Waller v. Hormel Foods Corporation*, 120 F.3d 138 (8th Cir. 1997) are "make whole doctrine" cases, not common fund doctrine cases. The make whole rule, which prohibits enforcement of subrogation clauses, is substantially different that the common fund doctrine. This difference was noted by Judge Easterbrook in the present case. The common fund doctrine does not prohibit the enforcement of subrogation. The make whole doctrine, on the other hand, is analogous to the anti-subrogation statute preempted by this court in *FMC Corporation v. Holliday*, 498 U.S. 52 (1990). *Ryan*, *Bollman Hat Company* and *Cagle v. Brunner*, 112 F.3d 1510 (11th Cir. 1997) are not ERISA preemption cases and consequently cannot create conflicts with the Seventh Circuit's preemption decision in this case.

The circuit court decisions of *Waller*, *Bollman Hat Company*, *Cagle*, *Ryan* and *Barnes* are not in conflict with the Seventh Circuit's decision in the present case which allowed, based on the factual record, the common fund doctrine to reduce petitioner's recovery. In these cases, the court looked to the subrogation provision and interpreted its terms in determining whether a common law principal would affect subrogation rights.[5] These cases could be said to stand for the proposition that specific unambiguous language in a subrogation provision, purporting to override common law to the contrary, will be enforced as written and will override common law doctrines. However, as Judge Easterbrook noted in the Seventh Circuit's decision in the present case, those facts were not present here. There is no evidence in the record that petitioner's subrogation provision contained terms overriding common law doctrines.

5. *Waller*, 120 F.3d at 1440-1441, *Bollman Hat Company*, 112 F.3d at 116-117, *Cagle*, 112 F.3d at 1521-1522, *Ryan*, 78 F.3d at 127 and *Barnes*, 64 F.3d at 1395.

The Court should not accept *certiorari* because the present case does not conflict with the cases relied on by petitioner and the factual record is incomplete.

The Seventh Circuit in the present case properly followed this Court's precedent in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 654 (1995) in holding that the Illinois common fund doctrine is not preempted by ERISA's supersedure provision. This Court has said that state laws of general applicability which impose some burdens on the administration of ERISA plans do not "relate to" them within the meaning of section 514(a) of ERISA. *Travelers*, 514 U.S. at 668. The Illinois common fund doctrine is a state law of general applicability. Instead of burdening the administration of ERISA plans, the common fund doctrine may decrease their operating costs.[6] Judge Easterbrook, in the present case, noted that the common fund doctrine may decrease the plan's cost to collect its subrogation recovery because of economies using one lawyer. There is no need for this Court to once again review a state law of general applicability that does not "relate to" employee benefit plans within the meaning of section 514(a) of ERISA. And there is no need to accept *certiorari* because there was no misapplication of the *Travelers* precedent.

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6. Under the Illinois common fund rule, plan administrators will always have three options in enforcing subrogation clauses and they are free to choose the cost effective option:

1) rely on the legal services of the injured plan participant's attorney and accept application of the common fund doctrine;

2) intervene in the plan participant's lawsuit; or

3) file its own lawsuit.

Consequently, ERISA's federal uniform regulatory scheme remains unimpaired.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

FRANK A. PERRECONE
Counsel of Record
FEROLIE, PERRECONE & WHITE, LTD.
Attorneys for Respondents
321 West State Street, Suite 800
Rockford, Illinois 61101
(815) 962-2700

APPENDIX A — PETITION TO ADJUDICATE SUBROGATION CLAIM DATED JANUARY 4, 1996

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL COURT
COUNTY OF WINNEBAGO

Case No. 94 L 352

RONALD BLACKBURN and BARBARA BLACKBURN,

Plaintiffs,

v.

BRYAN BECKER,

Defendants,

RONALD BLACKBURN and BARBARA BLACKBURN,

Petitioners,

v.

SUNDSTRAND CORPORATION,

Respondent.

PETITION TO ADJUDICATE SUBROGATION CLAIM

Now come the petitioners, Ronald Blackburn and Barbara Blackburn, by Brassfield, Cowan & Howard their attorneys, and say as follows:

1. This is a suit for personal injuries arising out of a motor vehicle collision.

2. Plaintiffs filed suit against the tortfeasor, and that claim has been settled for $100,000.00 for Ronald Blackburn's personal injuries and $5,000.00 for Barbara Blackburn's personal injuries.

3. The petitioner, Ronald Blackburn, was previously employed by the Respondent, Sundstrand Corporation. He was laid off, and pursuant to the provisions of COBRA he continued his medical hospital insurance through Sundstrand Corporation, with Mr. Blackburn paying the premiums for this insurance.

4. Sundstrand Corporation paid medical expenses incurred by Mr. and Mrs. Blackburn for their injuries caused by the tortfeasor. Sundstrand claims subrogation in the amount of $26,830.92.

5. The settlement against the tortfeasor was obtained entirely through the efforts of Brassfield, Cowan & Howard, attorneys for the petitioners. The settlement was not produced in any way through the efforts of Sundstrand Corporation or its attorneys.

6. Brassfield, Cowan & Howard has a written contingent fee agreement with the Blackburns, wherein the Blackburns agreed to pay 1/3 of any settlement to their attorneys plus expenses.

7. The Blackburns have incurred $1,125.87 in litigation expenses.

8. On December 19, 1995 counsel for the petitioners advised counsel for Sundstrand Corporation that the petitioners were willing to reimburse Sundstrand Corporation for its

subrogation, less attorneys fees of 1/3 and a pro-rata share of the litigation expenses in accordance with *Baier v. State Farm Insurance Co.*, 66 Ill.2d 119 (1977) and the so called common fund doctrine.

9. In a letter dated December 22, 1995, counsel for Sundstrand Corporation refused the request of petitioners' attorneys for reimbursement of their attorney's fees and pro-rata litigation expenses, claiming preemption by the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. 1144(a).

10. Under Illinois law, the common fund doctrine is not preempted by ERISA. The fund doctrine will be applied not withstanding claims that ERISA preempts state law. *Scholtens v. Schneider*, 274 Ill. App. 3d 102 (1st Dist. 1995). See also *Kelleher v. Hood*, 238 Ill.App.3d 842, 850 (2d Dist. 1992).

WHEREFORE the petitioners ask that the court enter an Order adjudicating respondent's subrogation claim, and ordering that the subrogation claim be reduced by 1/3 plus the respondent's pro-rata share of petitioners' litigation expenses.

RONALD BLACKBURN and
BARBARA BLACKBURN,
Petitioners,

BRASSFIELD, COWAN & HOWARD,
Their Attorneys,

s/ Alfred W. Cowan
ALFRED W. COWAN

Appendix A

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

s/ Alfred W. Cowan
ALFRED W. COWAN

BRASSFIELD, COWAN & HOWARD
1107 Rockford Trust Building
P.O. Box 590
Rockford, IL 61105
(815) 968-8878
Firm No. 561

Appendix A

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that a copy of the foregoing was served upon the following:

Mr. Robert Quick
Human Resources Counsel
Sundstrand Corporation
4949 Harrison Avenue
P.O. Box 7003
Rockford, Illinois 61125-7003

Mr. Dennis Cotter
Querrey & Harrow
Stewart Square, Ste. 420
308 West State Street
Rockford, Illinois 61101

by enclosing same in an envelope addressed to them with postage fully prepaid and by depositing said envelope in a U.S. Post Office Mail Box in Rockford, Illinois on the 4th day of January, 1996.

s/ Rosanne T. Quick

BRASSFIELD, COWAN & HOWARD
1107 Rockford Trust Building
P.O. Box 590
Rockford, IL 61105
(815) 968-8878
Attorneys for Petitioners.
Firm No. 561

APPENDIX B — NOTICE OF REMOVAL FILED FEBRUARY 2, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Case No. 96C50027

RONALD BLACKBURN and BARBARA BLACKBURN,

Plaintiffs,

v.

BRYAN BECKER,

Defendants,

RONALD BLACKBURN and BARBARA BLACKBURN,

Petitioners,

v.

SUNDSTRAND CORPORATION,

Respondent.

NOTICE OF REMOVAL

Sundstrand Corporation hereby notifies plaintiffs Ronald Blackburn and Barbara Blackburn of its removal of its Petition to Adjudicate Subrogation Claim brought in the Circuit Court of the 17th Judicial Circuit, County of Winnebago, State of Illinois entitled Case No. 94 L 352. In support of said Notice of Removal Sundstrand Corporation states as follows:

Appendix B

1. It has been served with the "Petition to Adjudicate Subrogation Claim" by means of a letter and Notice of Hearing addressed to Mr. Robert Quick, Human Resources Counsel for Sundstrand Corporation.

2. Sundstrand Corporation has received no other pleadings from the plaintiff in its state court action.

3. The underlying dispute between plaintiffs and Sundstrand Corporation is a federal question with original jurisdiction vested in this Court pursuant to 29 U.S.C. 1444, *et. seq.*, Employee Retirement and Income Security Act (hereinafter "ERISA").

Venue is proper in the United States District Court for the Northern District of Illinois, Western Division, premised on 29 U.S.C. 502(e)(2) which provides, in relevant part, that venue is proper in the judicial district in which the ERISA-qualified plan is administered.

WHEREFORE, Sundstrand Corporation prays this Court remove the Petition to Adjudicate Subrogation Claim brought by the plaintiffs from the Circuit Court of the 17th Judicial Circuit, County of Winnebago, State of Illinois, to the United States District Court for the Northern District of Illinois, Western Division.

SUNDSTRAND CORPORATION

s/ Patrick J. Winn
By: Patrick J. Winn
One of its Attorneys

Appendix B

Patrick J. Winn
SUNDSTRAND CORPORATION
4949 Harrison Avenue
Rockford, Illinois 61108
815-226-3885

(3)

Supreme Court, U.S.
FILED
NOV 7 1997
CLERK

No. 97-556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SUNDSTRAND CORPORATION,

Petitioner,

v.

RONALD BLACKBURN and BARBARA BLACKBURN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY MEMORANDUM

CHARLES B. WOLF
(Counsel of Record)
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I.

RESPONDENTS' ARGUMENT, CONCERNING THE COMPLETENESS OF THE FACTUAL RECORD, IS A RED HERRING.

Respondents correctly state that the precise language of the Sundstrand benefit plan's subrogation clause is not in the record on appeal. However, this circumstance is a red herring which should not affect this Court's decision because the plan's language is completely immaterial to the legal question presented by the instant case.

Until Judge Easterbrook issued his erroneous decision, Respondents framed the issue in this case as a pure legal question of ERISA preemption. They never thought, for one moment, that there was any issue of plan interpretation in the case or any need to parse the terms of Sundstrand's plan. That is why they did not put the language into the record. That is also why the Blackburns' state court Petition to Adjudicate Subrogation Claim (Brief in Opp., App. at 3a)[1] simply notes that Sundstrand has claimed subrogation rights under its plan and asserts that those rights are overcome by the Illinois common-fund doctrine which, they contend, is not preempted by ERISA. Thus, the District Court noted that "the facts are taken from the allegations in the petition to adjudicate" (Petition, App. at B2)[2] and observed

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[1] References to the Respondents' Brief in Opposition are cited as "Brief in Opp., ___."

[2] References to the Petition for Writ of Certiorari are cited as "Petition, ___."

that the Blackburns had not raised any issue of plan interpretation or identified any ambiguity in plan language (Petition, App. at B9-B10). Nor was any such issue raised on appeal to the Seventh Circuit.

The Blackburns' new argument plainly is based on Judge Easterbrook's *sua sponte* suggestion that the result of this case might be different if the plan language clearly and expressly purported to contradict the Illinois common-fund doctrine (Petition, App. at A7). This portion of the Seventh Circuit's opinion is illogical and unprecedented for several reasons. First, the Illinois common-fund doctrine is an equitable doctrine of general application, not a rule of interpretation or construction which applies to ambiguous or silent documents. *Scholtens v. Schneider*, 173 Ill.2d 375, 385-6, 671 N.E.2d 657, 663 (1996). Second, it is beyond peradventure that ERISA preemption disputes must be resolved as a matter of statutory construction and Congressional intent; no court ever has permitted a plan sponsor to control the outcome of a preemption question through artful plan drafting. Finally, Judge Easterbrook plainly had no evidentiary basis for his gratuitous observation that "Sundstrand's plan does not have . . . a requirement [for the participant to take full responsibility for the legal expenses of his tort action]" (Petition, App. at A7).

Contrary to the Blackburns' argument, this Court can and should resolve the important issue of ERISA preemption in this case on the existing record. This legal issue can be decided, as it was in the courts below, without reference to the specific terms of Sundstrand's plan.

II.

RESPONDENTS' ARGUMENT, THAT NO SPLIT EXISTS AMONG THE CIRCUITS BECAUSE THE CASES DECIDED IN OTHER CIRCUITS TURN ON DISTINGUISHABLE PLAN LANGUAGE, IS A SIMILAR RED HERRING.

For much the same reasons discussed above, this Court should reject Respondents' effort to distinguish the instant case from other Court of Appeals decisions on the ground that they involved unambiguous subrogation provisions (Brief in Opp., at 9). Those cases, like the instant case, involved straightforward, common subrogation clauses which provide the plan with the first dollars of any tort recovery, unreduced by the participant's attorney's fees. The objective of such plan provisions was enforced by the numerous Court of Appeals decisions cited in the Petition herein, a result dictated by this Court's holding in *FMC Corporation v. Holliday*, 498 U.S. 52, 111 S.Ct. 403 (1990). This Court's holding in *Holliday* and the objective of such straightforward subrogation language is manifestly frustrated by the common-fund doctrine and by the Seventh Circuit's conflicting decision below.

In short, the simple, unencumbered record in this case provides an ideal platform to provide legal guidance to the lower courts and practitioners on ERISA preemption and to correct the Seventh Circuit's erroneous understanding of this Court's recent decisions in the area.[3]

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[3] Respondents also suggest that this Court's decision in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 115 S.Ct. 1671

(continued...)

Respectfully submitted,

CHARLES B. WOLF
(Counsel of Record)
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& KAMMHOLZ
222 North LaSalle Street
Suite 2600
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(312) 609-7888

Attorneys for Petitioner

Dated: November 7, 1997

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[3] (...continued)
(1995) stands for the proposition that state laws of general application can never be preempted by ERISA, even if they directly contradict the terms of a plan created under ERISA (Brief in Opp., at 10). This is precisely the type of misunderstanding of the preemption doctrine which this Court ought to correct.